(3)

No. 87-1602

In The

Supreme Court of the United States

October Term, 1988

RONALD D. CASTILLE, District Attorney of Philadelphia County; THOMAS FULCOMER, Superintendent, Huntingdon State Correctional Institute; and LEROY ZIMMERMAN, Attorney General of Pennsylvania,

Petitioners,

v.

MICHAEL PEOPLES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is there compliance with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b) (1982) if the state courts' opportunity to consider and correct an alleged constitutional violation is not a meaningful opportunity within the context of state court practices and procedures?

2. Does a convicted state prisoner's mere token presentation to the highest state court, of a claim which is unreviewable as a matter of state law because of a prior procedural default, comply with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b)?

3. Does a convicted state prisoner's mere token presentation to the highest state court, of an ineffectiveness or other claim which is unreviewable as a matter of state law because of the absence of a substantiating record, comply with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b)?

4. Does a convicted state prisoner's *pro se* presentation of claims to the highest state court comply with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b) where the state practice of granting a prisoner's alternative request for counsel precludes substantive consideration of those claims?

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OPINIONS AND JUDGMENTS BELOW

The unreported December 31, 1987 panel opinion of the Court of Appeals for the Third Circuit is set forth in the Joint Appendix at pages 90-97. The Third Circuit's January 25, 1988 denial of rehearing is found at page 98 of the Joint Appendix. The April 1, 1987 Report and Recommendation of the United States Magistrate is set forth in the Joint Appendix at pages 77-83. The April 17, 1987 and April 21, 1987 Orders of the United States Dis-

trict Court for the Eastern District of Pennsylvania, are set forth at pages 84-85 and 89 of the Joint Appendix.

STATEMENT OF JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 2254, respondent, Michael Peoples, brought this habeas corpus action in the Eastern District of Pennsylvania. By orders dated April 17, 1987 and April 21, 1987, the Eastern District dismissed the habeas corpus petition for failure to exhaust state court remedies. On December 30, 1987, a Third Circuit panel entered a judgment and opinion reversing these orders and remanding for a hearing on the merits of the habeas corpus petition. Petitioner's request for rehearing by the Court of Appeals *en banc* was denied on January 25, 1988. *Certiorari* was timely sought on March 25, 1988, and granted on May 16, 1988.

The jurisdiction of this Court to review the judgment of the Third Circuit rests on 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

28 U.S.C. § 2254(b) and (c), provide:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

Respondent, a state court prisoner, is now incarcerated, serving a sentence of not less than fifteen (15) nor more than thirty (30) years as a consequence of his participation in a particularly brutal crime. During the early morning hours of August 2, 1980, respondent and two others abducted Robert Gallagher from a center city Philadelphia street and took him to the seventh floor hallway of the nearby Touraine Apartments. There they robbed and assaulted him and set him on fire (N.T. Triai, 114-115, 117-119, 120, 163-164, 170).

Because he was intoxicated, Mr. Gallagher did not recall the details of the incident. He remembered only that, at some point, he was hit in the head, kicked and set on fire (N.T. Trial, 115-116, 118-119). When he was found by a security guard in the apartment building's seventh floor hallway, he was unconscious and on fire (N.T. Trial, 153-154, 170, 191-192). The extent of his injuries required that he be immediately transported to the hospital; after his arrival it was established that his watch and wallet were missing (N.T. Trial, 197, 120).

While hospitalized, Mr. Gallagher was treated for extensive pancreatic and bladder injuries; in addition, the severity of the burns on his back necessitated a skin graft (N.T. Trial, 121). His hospitalization lasted twenty-one (21) days; approximately nine (9) of those days was spent in the hospital's intensive care unit (N.T. Trial, 121-122).

Respondent was arrested for his complicity in this crime approximately three (3) hours after its occurrence when he was found by police to be in possession of Mr. Gallagher's wallet (N.T. Trial, 198, 201-204, 233-234). Following his arrest, and after waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), respondent told police that he had found Mr. Gallagher's wallet in the street and denied being inside the Touraine Apartments on the night of the incident (N.T. Suppression, 103-107; N.T. Trial, 278, 283, 284).

Represented by court-appointed counsel, respondent sought unsuccessfully pre-trial to suppress (1) his statement, (2) physical evidence (Mr. Gallagher's wallet), and (3) in-court identifications and out-of-court photograhpic identifications made by the desk clerk and the security guard who were in the apartment building when the crime occurred (N.T. Suppression, 3, 170-171, 174, 177-178). The case then immediately proceeded to trial before a jury, presided over by the Honorable James T. McDermott, now a Pennsylvania Supreme Court Justice.

At trial, Mr. Gallagher was unable to identify respondent (N.T. Trial, 147). He recalled only that one of the three abductors and attackers had a high "bush;" this hairstyle was similar to respondent's hairstyle at the time of his arrest (N.T. Trial, 118-119, 219-220; N.T. Suppression, 177). Other witnesses positively established respondent's presence in the apartment building when the assault occurred. Both Mr. Wright, the desk clerk, and Mr. Hassano, the guard who found Mr. Gallagher, testified that respondent left the apartment building shortly before Mr. Gallagher's discovery in the seventh floor hallway (N.T. Trial, 151-154, 167-170). Mr. Hassano also identified respondent as one of the people who entered the apartment building earlier with Mr. Gallagher (N.T. Trial, 161-162, 163-164). Respondent's possession of Mr. Gallagher's wallet some three hours after the attack was also shown (N.T. Trial, 198, 201-203). Additionally, the government established that a lineup to determine if Mr. Wright and Mr. Hassano could identify respondent, which respondent had requested and which had been scheduled to take place before the preliminary hearing, was cancelled because respondent's hairstyle was substantially different on the lineup date despite a court order prohibiting a pre-lineup change of appearance (N.T. Trial, 218-221, 229-230).

By way of defense, respondent intended initially to rely on his exculpatory statement and thereby to establish his allegedly innocent possession of his victim's wallet. He sought to so proceed because the trial court had determined that his testimony could be impeached and his credibility challenged by the admission into evidence, on rebuttal, of proof of some of his prior convictions for crimes in the nature of *crimen falsi* (N.T. Trial, 259).[1]

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[1]Pennsylvania statutory authority (42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982), previously Pa. Stat. Ann. tit. 19, § 711

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This attempt to place self-serving, unsworn evidence before the jury, about which respondent could not be cross-examined, was appropriately rejected (N.T. Trial, 259).[2] Respondent then chose to testify on his own behalf.

On direct examination respondent admitted to the crimes which the trial judge had ruled admissible on rebuttal for impeachment purposes (N.T. Trial, 269). He also disavowed the veracity of his previously offered post-arrest statement and said that he entered the Touraine Apartments with Gallagher to culminate a drug

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(Purdon 1964)) generally prohibits the cross-examination of testifying defendants about their prior crimes. Case law, however, permits some prior convictions for crimes involving dishonesty or false statement to be introduced into evidece on rebuttal for the limited purpose of attacking a testifying defendant's credibility . *See Commonwealth v. Bighum*, 452 Pa. 554, 562-563, 566, 307 A.2d 255, 260, 262-263 (1973). At the time of respondent's trial, the admissibility of such crimes, on rebuttal for impeachment purposes, was determined by applying the balancing test first set forth in *Commonwealth v. Bighum*, 452 Pa. at 567, 307 A.2d at 263, and later explained in *Commonwealth v. Roots*, 482 Pa. 33, 39-41, 393 A.2d 364, 365-368 (1978). (In 1987 the Pennsylvania Supreme Court modified those decisions and adopted a rule similar to Federal Rule of Evidence 609. *See Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987).) Applying *Bighum* and *Roots*, Judge, now Justice, McDermott determined during respondent's trial that only the robberies committed by him in 1973 and 1974, and the retail theft committed by him in 1978, were admissible for purposes of impeachment (N.T. Trial, 241-248).

[2]*See Commonwealth v. Murphy*, 493 Pa. 35, 43, 425 A.2d 352, 356 (1981) (where defendant "seeks at trial to introduce his own statements made at the time of arrest to support his version of the facts such testimony is clearly offensive to the hearsay rule").

deal, gave Gallagher money to obtain drugs for him, and waited for Gallagher on the building's fifth floor holding his wallet as collateral. When Gallagher did not return after twenty minutes, he and the man with whom he was waiting decided to leave and return to the restaurant where he had earlier met Gallagher and was later stopped by the police (N.T. Trial, 270-275).

While cross-examining respondent, the prosecutor briefly noted the robbery and shoplifting convictions previously referenced by respondent, without discussing their underlying facts (N.T. Trial, 282). The prosecutor also extensively covered respondent's earlier, very substantially different, statement to the police, as well as respondent's prior adoption of that statement (N.T. Trial, 283-290).

On January 16, 1981, the jury convicted respondent of arson, robbery and aggravated assault. Respondent's bail was revoked pending disposition of post-verdict motions (N.T. Trial, 407-408, 410).

Post-trial, respondent continued to be represented by the same court-appointed attorney, who filed post-verdict motions raising some but not all of his five subsequent habeas claims (J.A. 11-13). These motions were heard and denied by the court on April 28, 1981 (N.T. Post-verdict Motions, 29).[3] Respondent was then sentenced to

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[3]Under Pennsylvania law, post-verdict motions are the initial stage of the appellate process. Any claim omitted from written post-verdict motions is waived for subsequent appellate consideration. *See* Pa. R. Crim. P. 1123(a) (only issues contained in written post-verdict motions may be heard or argued); Pa. R. App. P. 302(a) (issues not raised in lower court may not be raised for the first time on appeal); and *Commonwealth v. Mitchell*, 464 Pa. 117, 121-126, 346 A.2d 48, 50-53 (1975) (announcing strict enforcement of appellate waiver provisions).

serve ten (10) to twenty (20) years for the arson, a consecutive five (5) to ten (10) years for the robbery, and a concurrent ten (10) year probationary sentence for the aggravated assault (N.T. Post Verdict Motions, 37-38).

Represented by new counsel, respondent appealed to the Pennsylvania Superior Court, the Commonwealth's intermediate appellate court. That court affirmed the judgment of sentence in an unreported Memorandum Opinion. *Commonwealth v. Peoples,* 319 Pa. Super. 621, 466 A.2d 720 (1983) (J.A. 44-49). Respondent next filed with the Pennsylvania Supreme Court a *pro se* pleading entitled "Petition for Allowance to File Appeal to Review Errors of Superior Court With Appointment of New Counsel" (J.A. 49-59).[4] Besides purporting to raise a number of legal claims, this petition requested the appointment of counsel (J.A. 49, 58-59). The Commonwealth's response noted the request for counsel, urged a hearing to determine respondent's entitlement to court-appointed counsel, and advised the Supreme Court that a substantive response would not be offered unless requested by the Court (J.A. 60). No such answer was ever requested; rather, the Supreme Court ordered that counsel be provided and directed new counsel to seek discretionary review within thirty (30) days after appointment (J.A. 61). A counselled Petition for Allowance of Appeal (discretionary review) was subsequently filed on respondent's behalf

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[4]Respondent was entitled to appellate review, as of right, only by the Superior Court. Supreme Court jurisdiction over his case was entirely discretionary. *See* 42 Pa. Cons. Stat. Ann. §§ 722, 724, 742, 761 (Purdon 1981).

(J.A. 62-68). It was denied by the Supreme Court, without explanation, on November 4, 1985 (J.A. 69).[5]

Because the Supreme Court's ruling was not a ruling on the merits, respondent's claims were not thereby rendered "finally litigated" so as to bar them from state post-conviction review.[6] Rather, the court's denial of discretionary review opened the way for respondent to seek collateral review of his conviction pursuant to state statute.[7] Respondent chose, however, to proceed under 28

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[5]Pa. R. App. P. 1114, Considerations Governing Allowance of Appeal, which is patterned after U.S. Sup. Ct. Rule 17, Considerations governing review on certiorari, states that such review "is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor." Similarly, as with *certiorari* denials by this Court, reasons for the denial of discretionary review are rarely given by the Pennsylvania Supreme Court.

[6]*See Commonwealth v. Tarver,* 493 Pa. 320, 331, 426 A.2d 569, 575 (1981) (Supreme Court denial of discretionary review is not a ruling on the merits which would render a claim "finally litigated" (and therefore non-reviewable) pursuant to 42 Pa. Cons. Stat. Ann. § 9544(a) (Purdon 1982) (repealed 1988)).

[7]Pennsylvania's collateral review statute, which was then the Post Conviction Hearing Act, is now the Post Conviction Relief Act, Act No. 1988-47, 1988 Pa. Legis. Serv. 229 (Purdon) (to be codified at 42 Pa. Cons. Stat. Ann. §§ 9541-9546). Like the prior statute, the now applicable statute provides respondent with an available state court avenue of relief since his claims of error are within the act's purview and are not otherwise barred. Claims which may be asserted under the present act include the ineffective assistance of counsel which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place" (§ 9543(A)(2)(II)), and any violation of the constitution, law or treaties of the United States "which would require the granting of federal habeas corpus relief to a state prisoner" (§ 9543(A)(2)(V)). Even if previously waived (procedurally defaulted) in the state court proceedings, claims are cognizable under the Post Con-

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U.S.C. § 2254. In his federal habeas corpus petition filed pursuant thereto, he claimed entitlement to relief on five (5) different grounds.

The United States District Court for the Eastern District of Pennsylvania dismissed respondent's petition because of non-exhaustion resulting from state court appellate defaults and the availability of a state court avenue of review (J.A. 77-83, 84-85, 89).[8] This order comported with Pennsylvania's strict waiver (procedural default) and other procedural rules, and with the procedural history of the five claims asserted by respondent in his federal habeas corpus petition.

Under Pennsylvania law, claims are reviewable only if they are timely and fairly raised at all prior stages of the proceedings. Thus, for a claim to be considered by the Pennsylvania Supreme Court on discretionary review, it must have been raised (1) before or during trial, (2) in written post-verdict motions, (3) in the Superior Court, and (4) in the petition for discretionary review (Petition for Allowance of Appeal). *See Commonwealth v. Drake*,

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viction Relief Act if they "resulted in the conviction or affirmance of sentence of an innocent individual" or if the state court waiver "does not constitute a state procedural default barring federal habeas corpus relief" (§ 9543(A)(3)), so long as they are not "previously litigated" pursuant to § 9544(A)(3), the substantial equivalent of "finally litigated" pursuant to prior § 9544 (a).

[8]The District Court's dismissal orders (J.A. 84-85, 89) predated the April 27, 1987 Third Circuit decision in *Chaussard v. Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S. Ct. 139 (1987), upon which the Third Circuit subsequently relied in deciding this case.

489 Pa. 541, 414 A.2d 1023 (1980).[9] Where a claim is not properly preserved for review but new counsel assumes representation of a defendant, new counsel can resuscitate any previously waived (defaulted) claim by alleging cause to overcome the default, *i.e.*, the ineffective assistance of prior counsel. The issue of ineffective assistance must be raised at the first opportunity when an accused is represented by new counsel, however, or there is a waiver (procedural default) as a matter of state law.[10] Further, a claim of ineffective assistance of counsel will not be decided on direct appeal unless clear and irrefutable proof of the issue appears on the face of the record. *See Commonwealth v. Cook*, 230 Pa. Super. 283, 284, 326 A.2d 461 (1974). If the record is inadequate, an appellate court may remand the case for an evidentiary hearing, *see Commonwealth v. Davis*, 499 Pa. 282, 283-284, 453 A.2d 309, 310 (1982), or await the results of a post-conviction proceeding, *see Commonwealth v. Cook*, 230 Pa. Super. at 283, 326 A.2d at 461.

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[9]This rule is admitting of no exception and applies equally to claims abandoned at the intermediate appellate court level. *See Commonwealth v. Piper*, 458 Pa. 307, n.5 at 310, 328 A.2d 845, n.5 at 847 (1974) (claim raised in trial or sentencing court but abandoned in the intermediate appellate court is waived for Supreme Court review); *accord Sheppard v. Old Heritage Mut. Ins. Co.*, 492 Pa. 581, 591, 425 A.2d 304, 309 (1980) (failure to pursue issue on appeal is just as effective a waiver as failure to initially raise it).

[10]*See Commonwealth v. Webster*, 490 Pa. 322, 325, 416 A.2d 491, 492 (1980) (exception to rule that issues not raised in post-verdict motions will not be considered on appeal is when ineffectiveness of prior counsel is raised; but in such a case, ineffectiveness must be raised at earliest stage in proceedings at which counsel whose representation is being challenged no longer represents the accused); *accord Commonwealth v. Hubbard*, 472 Pa. 259, n.6 at 276-277, 372 A.2d 687, n.6 at 695 (1977).

The foregoing principles are pertinent in determining whether all of respondent's five habeas claims could be reviewed in the state appellate courts, and, thus, whether the state courts had a fair opportunity to consider those claims. *See Picard v. Connor,* 404 U.S. 270, 276-277 (1971).

Claim 1—Due Process and State Statutory Violations Based on the Prosecutor's Cross-Examination of Respondent about Prior Robbery and Theft Convictions in the Face of 42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982) (J.A. 73): To the extent that this meritless state law claim was previously presented, it was presented in violation of state appellate procedures.[11] The challenged cross-examination was not objected to at trial (N.T. Trial, 269). Neither was it raised in post-verdict motions or before the Superior Court (*see* J.A. 11-13, 26-43).[12] It was first alluded to in respondent's *pro se* Supreme Court petition. There, respondent alleged only that trial counsel was ineffective for failing to object to the cross-examination (J.A. 51-52). This claim could not then be considered for

[11]See, with respect to the merits of this claim, n.1 at pages 5-6, and *Commonwealth v. Garnett,* 204 Pa. Super. 113, 117-118, 203 A.2d 328, 330 (1964) (cross-examination of defendant about prior crimes brought out on direct examination, in technical violation of Pa. Stat. Ann. tit. 19, § 711 (Purdon 1964) [recodified as 42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982)] not error where "ensuing questions by the district attorney were in natural development of the facts already in evidence and without design to prejudice the defendant").

[12]On post-verdict motions, and again in the Superior Court, it was alleged only that the trial court abused its discretion in allowing the use of two prior robbery convictions for impeachment purposes (J.A. 12, 27, 28, 34-37). Such a claim is substantially different than the assertion of a § 5918 violation. *See* n.1, at pages 5-6.

three separate reasons. First, respondent failed properly to layer his claim and to allege appellate court counsel's ineffectiveness for failing to challenge trial counsel's stewardship. *See* text preceding at page 11 and n.10 at page 11. Second, it could not be considered because of the standard state court practice of appointing appellate counsel on request. Finally, it could not be considered, as a matter of state practice and procedure, because of the absence of a substantiating record. *See* text preceding at page 11, *Commonwealth v. Davis,* 499 Pa. 282, 283-284, 453 A.2d 309, 310 (1982), and *Commonwealth v. Cook,* 230 Pa. Super. 283, 284, 326 A.2d 461 (1974). In the subsequent counselled *allocatur* petition, respondent did allege both trial and appellate counsel's ineffectiveness for failing to preserve this claim. Even then, however, it could not be considered because of the lack of a substantiating record.

Claim 2—Due Process and Equal Protection Violations Based on the Denial of Respondent's State Law Right to a Bench Trial (J.A. 74): This claim also was not presented in a specific and orderly fashion in the state courts. Although raised as a state law claim at trial (N.T. Trial, 102, 105) and again at post-verdict motions (J.A. 12), it was omitted in respondent's Superior Court appeal (*see* J. A. 26-43). In the *pro se* Supreme Court petition, it was asserted by respondant (J.A. 53-54). Respondent, however, although he raised other ineffectiveness claims (J.A. 51-52), did not properly raise and preserve this claim by alleging Superior Court counsel's failure to raise and preserve it (J.A. 53-54). *See Commonwealth v. Piper,* 458 Pa. 307, 328 A.2d 845 (1974). Further, given the state procedural scheme with respect to the appointment of counsel,

the Supreme Court did not and could not then consider the merits of any allegations of error in this petition (J.A. 61). This allegation was omitted from the subsequent counselled *allocatur* petition (*see* J.A. 62-68).

Claim 3—Due Process Violation arising from the Admission of Suggestive and Tainted Identification Evidence (J.A. 74): This claim was raised in the trial court by the filing and litigation of a motion to suppress identification evidence (N.T. Suppression, 3, 177-178). Post-verdict it was alleged that suppression should have been granted (J.A. 12), and in the Superior Court respondent challenged both the out-of-court and in-court identifications (J.A. 26-27, 29-34). Respondent also raised these arguments in his *pro se* Supreme Court petition which was not substantively considered by the court as a matter of orderly state procedure (J.A. 54-55). The subsequent counselled *allocatur* petition omitted any challenge to identification evidence (*see* J.A. 62-68).

Claim 4—Deprivation of the Sixth Amendment Right to Competent Counsel Based on Trial Counsel's Failure to Challenge Respondent's Second Stopping and the Related Seizure of Physical Evidence (J.A. 74): As this claim involved an allegation of ineffective assistance of trial counsel, state law required its assertion at the first available opportunity—here, when new counsel assumed representation at the Superior Court level. *See Commonwealth v. Webster,* 490 Pa. 322, 325, 416 A.2d 491, 492 (1980) and n.10 at page 11. It was not then asserted (*see* J.A. 26-43). Neither was it raised in the *pro se* Supreme Court petition (*see* J.A. 49-59). The later counselled *allocatur* petition did allege Superior Court counsel's ineffectiveness for not challenging the correctness of the trial court's physical

evidence suppression ruling (J.A. 67). This, however, is a different argument than respondent's habeas corpus allegation that trial counsel ineffectively failed altogether to seek such suppression.

Claim 5—Deprivation of the Sixth Amendment Right to Competent Counsel Based on Trial Counsel's Failure to Challenge Evidence of Respondent's Contempt for Violating the Lineup/No Change of Appearance Court Order (J.A. 74-75): This ineffectiveness claim also was not raised at the first available opportunity in the Superior Court (see J.A. 26-43). It was subsequently raised in the *pro se* petition (J.A. 55-56). The claim, however, was not then substantively considered by the Supreme Court which chose, as a matter of state practice and procedure, to appoint counsel rather than consider any of the petition's allegations (*see* J.A. 60-61). Nor could the ineffectiveness claim then have been considered since it lacked a substantiating record and had not been raised at the earliest possible opportunity as required by law. *See Commonwealth v. Davis,* 499 Pa. 282, 453 A.2d 309 (1982); *Commonwealth v. Webster,* 490 Pa. 322, 416 A.2d 491 (1980); *Commonwealth v. Cook,* 230 Pa. Super. 283, 326 A.2d 461 (1974), text at page 11 and n.10 at page 11. Finally, this ineffectiveness claim was not raised in the subsequent counselled *allocatur* petition (*see* J.A. 62-68).

Thus, none of respondent's claims of error was presented to the Pennsylvania Supreme Court in a procedurally correct manner which would permit their substantive consideration as a matter of state court law and practice. Hence, as the District Court concluded, the comity-based exhaustion requirement of § 2254(b) was not met. The Third Circuit Court of Appeals subsequently concluded

otherwise and reversed based on *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir.), *cert. denied,* 108 S. Ct. 139 (1987) (J.A. 97).[13] That court so acted merely because each of the claims was somehow presented to the Supreme Court. Its action was without regard for whether an inadequate record or controlling state court procedures effectively precluded that court's substantive consideration of respondent's claims (*see* J.A. 90-97). It also declined to acknowledge that the Supreme Court could not have substantively considered the *pro se* pleading under the existing state scheme.[14] A timely petition for writ of *certiorari* was thereafter filed with this Court and granted on May 16, 1988.

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SUMMARY OF ARGUMENT

For federal habeas corpus exhaustion purposes, the Third Circuit employs a "mere presentation" rule. This rule liberally grants habeas review to state prisoners who

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[13]In *Chaussard,* two of the habeas claims presented to the Pennsylvania Supreme Court were abandoned at the intermediate appellate court level and, therefore, waived. *See Commonwealth v. Piper,* 458 Pa. 307, 328 A.2d 845 (1974) and n.9 at page 11. Misapplying this Court's opinion in *Smith v. Digmon,* 434 U.S. 332 (1978), the Third Circuit declined to attach habeas corpus significance to the state appellate court procedural default, concluding that the mere presentation of claims to a state's highest court, however improper, will satisfy the comity-based exhaustion requirement.

[14]The three judge panel noted that its ruling "may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement," but felt bound by the Third Circuit's earlier ruling in *Chaussard* (J.A. 95).

presented their claims in any fashion to the highest state court, regardless of whether they followed state-mandated procedures which are prerequisites for review on the merits. Such an ill-based approach deprives state courts of a fair opportunity to consider and correct all alleged violations, and conflicts directly with this Court's prior decisions and with the decisions of every other circuit addressing the issue. It, therefore, should be rejected.

Respondent here presented several claims to the Pennsylvania Supreme Court, each of which was unreviewable because of one or more violations of state procedure or practice. Most claims were not raised at every stage of the appellate process and were, therefore, barred by procedural defaults. Some claims were unreviewable because defendant failed to follow state procedures for obtaining a substantiating evidentiary record. Finally, some claims were raised in a *pro se* filing which alternatively requested counsel. Under its standard practice, the state court treated this *pro se* filing only as a request for counsel.

Ignoring all of these violations, the Third Circuit found that respondent's token presentation of his claims satisfied the comity-based exhaustion requirement of 28 U.S.C. § 2254(b). It did so although there was no genuine possibility, given state practice and procedure, that the state supreme court could have reviewed the merits of the claims.

The Third Circuit's rule endorses and rewards state procedural violations, breeds disrespect for state procedures, and violates fundamental principles of comity. Unless repudiated by this Court, it will force already overburdened federal courts to assume the fact-finding role

Congress gave to the state courts, and to expend vast, additional resources to provide the evidentiary hearings and factual findings which state prisoners chose not to obtain in state court. The federal courts should not be so burdened and state prisoners should not be permitted to engage in such forum-shopping.

This Court should explicitly reject the Third Circuit's approach and make clear that deference must be afforded state court practices and procedures in determining whether the comity-based exhaustion requirement of 28 U.S.C. § 2254(b) has been met.

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ARGUMENT

DEFERENCE MUST BE AFFORDED STATE COURT PRACTICES AND PROCEDURES IN DETERMINING WHETHER THE EXHAUSTION REQUIREMENTS OF 28 U.S.C. § 2254(b) HAVE BEEN MET.

A convicted state prisoner seeking federal habeas corpus relief must either exhaust state court remedies, or demonstrate the absence of an available state court corrective process or the existence of circumstances rendering that process ineffective to protect his rights. *See* 28 U.S.C. § 2254(b). The exhaustion rule is satisfied only when the state courts have had a fair opportunity to consider and correct all alleged violations, and the substance of each federal claim was presented to the state courts in a substantially equivalent form. *See Picard v. Connor*, 404 U.S. 270, 276-278 (1971). Further, unless such compliance is established with regard to all claims asserted,

the petition must be dismissed. *See Rose v. Lundy*, 455 U.S. 509 (1982).[15]

Conflicts now exist among and within the circuits with respect to what constitutes, for exhaustion purposes, a full, fair and genuine opportunity for the state courts to review the merits of federally-based claims. This case permits the resolution of those conflicts. In so doing, this Court should make clear that the federal courts must give due regard for state court practices and procedures and insure that the state courts' opportunity for review is a meaningful one.

Significant to the resolution of the existing conflicts are this Court's prior rulings requiring state prisoners to

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[15]Although now codified, the exhaustion rule, which is designed principally "to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings," has been enforced by this Court since its decision in *Ex Parte Royall*, 117 U.S. 241 (1886). *See Rose v. Lundy*, 455 U.S. at 516. It reflects the long-standing policy of comity between federal and state courts, *see Ex Parte Hawk*, 321 U.S. 114, 117 (1944), and allows the state courts to "become increasingly familiar with and hospitable toward federal constitutional issues." *Rose v. Lundy*, 455 U.S. at 520. As such, it is "unseemly" not to give state courts the first opportunity to consider a defendant's claims. *See Picard v. Connor*, 404 U.S. 270, 276 (1971).

The exhaustion requirement also assures that claims presented to federal habeas courts will be "accompanied by a complete factual record . . . ." *Rose v. Lundy*, 455 U.S. at 520. Such a result gives real meaning to the comity-based presumption that state court findings of fact are correct and binding on the federal habeas court. *See Sumner v. Mata*, 449 U.S. 539 (1981); 28 U.S.C. § 2254(d). This presumption of correctness would be of no use if there were no exhaustion requirement to insure that state courts had an opportunity to make findings of fact before federal habeas review. Subsumed in the principle of comity is a concern with the orderly administration of criminal justice. *See Francis v. Henderson*, 425 U.S. 536, 540 (1976).

use a state's normal channels of review. Bypassing those channels, by use of plainly incorrect state procedures, or by resort to narrow writs limited to the exercise of extraordinary review, has been held to preclude the opportunity for meaningful state review. *See Pitchess v. Davis*, 421 U.S. 482 (1975); *Ex Parte Hawk*, 321 U.S. 114 (1944).

The Third Circuit has violated the spirit and intent of this Court's prior holdings. Resort to a state's normal channels of review is only nominally required by its decisions. Under the circuit's "mere presentation" rule, which was applied instantly, federal habeas review is given to federally-based claims which were raised in the state supreme court regardless of whether state-mandated appellate or other procedures, which were prerequisites for state court review, were then followed.[16] The Third Circuit

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[16]In *Chaussard v. Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S. Ct. 139 (1987), two federal claims, presented in a petition for allowance of appeal to the Pennsylvania Supreme Court, had been abandoned at the intermediate court level, in violation of Pennsylvania's strict waiver (procedural default) law. *See* n.9 at page 11. Attaching no significance at all to the state appellate default, the comity-based exhaustion rule was held satisfied. Wrongly relying on this Court's decision in *Smith v. Digmon*, 434 U.S. 332 (1978), a case in which claims were raised in a proper way in the state system, the Third Circuit treated its decision in *Chaussard* as a simple application of the rule that discretionary review has the same exhaustion consequences as an appeal as of right. The equivalence of the two kinds of appeals, for exhaustion purposes, is not in dispute. What is objected to is the Third Circuit's conclusion that a state's adherence to its reasonable procedures is a mere act of discretion, entitled to no federal deference. One unfortunate consequence is that courts in the Third Circuit have found state remedies "exhausted" even where a prisoner's petition to the Pennsylvania Supreme Court plainly violated state procedure because it was not timely filed and contained waived (defaulted) claims. *See, e.g., Ross v. Fulcomer*, 610 F. Supp. 560 (E.D. Pa. 1985); *accord, Moore v. Fulcomer*, 609 F. Supp. 171 (E.D. Pa. 1985).

adheres to this rigid position even where the state provides a collateral remedy through which a state prisoner may seek to correct the procedural irregularities which arose on direct appeal, and thus obtain full state review of his claims.[17]

Here, three of Pennsylvania's procedures and practices barred the state's high court from reviewing the merits of respondent's claims. These were uniformly ignored by the Third Circuit.

First, when claims 1, 2, 4 and 5 were presented to the highest state appellate court they could not be substan-

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[17]The question of whether a state prisoner has sufficiently complied with state procedures in raising his claims, for exhaustion purposes, is distinct from the procedural default and waiver issues considered by this Court in *Fay v. Noia*, 372 U.S. 391 (1963) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *Wainwright v. Sykes*, 433 U.S. at 78-81 (1977) (distinguishing the two principles). The *Wainwright* cause and prejudice rule applies when the state has had a full opportunity to address the question of whether to apply its waiver law. Where, for example, a claim is unobjected to at trial but raised on appeal, the state appellate courts are confronted directly with the question of whether to apply the state's contemporaneous objection rule and preclude review. If this occurs, the federal habeas court is confronted with an independent state ground—a procedural default—which will also preclude federal review unless the petitioner can demonstrate cause for and prejudice from his procedural default. This and similar situations presuppose that no further state remedy is available, and, thus, that a petitioner's claims are exhausted within the meaning of § 2254. By way of contrast, where, as here, a state court procedural default precludes a finding of exhaustion, state review is not barred by an independent state ground, and collateral review remains available to the state prisoner. The possibility remains that an appellate waiver will be excused, allowing state, and, subsequently, federal, review of defaulted claims. Similarly, belatedly-raised claims, alleging ineffectiveness or after-discovered evidence issues which lack an adequate record, may still be reviewed by the state courts.

tively considered because their earlier omission at one or more stages of the litigation made them unreviewable as a matter of state law under Pennsylvania's waiver (procedural default) rule. That rule, viewed by Pennsylvania courts as serving vital judicial interests, is strictly enforced. *See Commonwealth v. Drake,* 489 Pa. 541, 414 A.2d 1023 (1980); *Commonwealth v. Mitchell,* 464 Pa. 117, 121-126, 346 A.2d 48, 50-53 (1975). Nonetheless, the Third Circuit ruled that state remedies had been exhausted with regard to those claims, making adherence to this integral part of Pennsylvania's waiver scheme unnecessary for federal habeas applicants (J.A. 96).

Respondent also began, but did not complete, the Pennsylvania procedure provided to review ineffective assistance of counsel claims raised for the first time on appeal. Although some claims of ineffective assistance of trial counsel were raised in the Pennsylvania Superior Court, no ineffectiveness claim set forth in the subsequent federal habeas petition was then asserted. Thus, as to the latter habeas corpus claims, respondent violated Pennsylvania's requirement that ineffectiveness claims be raised at the first opportunity after new counsel enters the case. *See* n.10 at page 11.

Even had these ineffectiveness claims been raised, they were then unreviewable and would have been treated like the other ineffectiveness claims which the Superior Court found could not be resolved based on the existing record (*see* J.A. 47-48). Similarly, the challenges to the ineffectiveness of trial and appellate counsel, which were finally raised for the first time in the Pennsylvania Supreme Court (claims 1, 2, 4 and 5), could not then be decided. That court could not rule upon such claims

without the benefit of an evidentiary hearing and/or the findings and reasoning of the lower courts. In Pennsylvania, where ineffectiveness claims are raised for the first time in the appellate courts and lack an adequate factual record, remand or resort to the state's collateral remedy is required so that the record can be prepared. Text at page 11. The Third Circuit ruled, nonetheless, that resort to the state's collateral remedy was unnecessary. Although it foreclosed the state from holding an evidentiary hearing in a court of record or making factual and credibility findings, the Third Circuit concluded that the state had received a fair opportunity to review the ineffectiveness claims (J.A. 96-97).

Finally, the Third Circuit concluded that all claims raised in respondent's *pro se* Supreme Court proceeding, which included a request for counsel, were exhausted because, as a result of that pleading, there existed an opportunity for their consideration (J.A. 94-95). This also did not show sufficient deference to state court practice.

Pennsylvania has made the "valid choice" of providing prisoners with counsel, beyond federal constitutional requirements. *See Pennsylvania v. Finley,* 107 S. Ct. 1990 (1987) (although not constitutionally required, Pennsylvania provides counsel to prisoners on collateral review). Pursuant to that practice, the state supreme court customarily appoints counsel on applications for discretionary review, where, as here, counsel is requested (J.A. 61). Because clients are bound by the decisions of counsel, state supreme court review in the present case was limited, by the grant of respondent's request for counsel, to the issues subsequently raised in the counselled petition, *see Murray v. Carrier,* 477 U.S. 478 (1986), and the state supreme

court reasonably did not review the claims presented in the uncounselled petition. The Third Circuit ruled, nevertheless, that the state's "choice," designed to facilitate the presentation of respondent's appeal issues, would be accorded no federal deference (J.A. 95). For exhaustion purposes, the state court was charged with having reviewed the merits of the claims in the *pro se* petition, despite the state practice directly to the contrary.[18]

The Third Circuit is in conflict with every other circuit addressing this issue, both in policy and result. The Seventh Circuit unequivocally rejected the Third Circuit approach as violative of fundamental comity concerns, stating:

> [T]he Indiana Supreme Court presumably could have chosen to ignore its procedural rule and passed on the merits of the constitutional issue. It cannot be said, however, that the court should be *required* to ignore its own procedures. "If a petitioner wishes to exhaust his claims, he is expected not only to use the normal avenues of relief but also to present his claims before the courts in a procedurally proper manner according to the rules of the state courts." [citation omitted] . . . The exhaustion rule is a rule of comity which recognizes that, while it is necessary for the federal courts to be available to protect the rights of state prisoners, it is also necessary that state courts be permitted to function without undue interference.

Wallace v. Duckworth, 778 F.2d 1215, 1223 (7th Cir. 1985) (emphasis added). Confronted with an identical issue, the

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[18]The Third Circuit panel in this case, while feeling bound by *Chaussard*, did acknowledge that, because of the state practice with respect to the appointment of counsel at this stage of appeal, "once a counseled petition had been filed, it would have been improper to consider the claims raised in the *pro se* petition but not the counseled one" (J.A. 95).

Ninth Circuit similarly concluded that it "need not find that the Oregon Supreme Court lacked jurisdiction to hear the claim," but only that the failure to comply with state procedures for the presentation of claims was not a "fair" opportunity for review, for federal habeas purposes. *Kellotat v. Cupp*, 719 F.2d 1027, 1031 (9th Cir. 1983).

Employing a similar rationale, a number of circuits have expressly held that presentation of claims in violation of state appellate waiver rules, similar to the violations in the present case, do not provide a fair opportunity for state review. *See Dickerson v. Walsh*, 750 F.2d 150 (1st Cir. 1984); *Dupuy v. Butler*, 837 F.2d 699 (5th Cir. 1988); *Wallace v. Duckworth*, 778 F.2d at 1223; *Diamond v. Wyrick*, 757 F.2d 192 (8th Cir. 1985); *McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986); *Kellotat v. Cupp*, 719 F.2d at 1031. *See, generally, Klein v. Harris*, 667 F.2d 274 (2d Cir. 1981).

Contrary to the Third Circuit, other circuits have also found that a meaningful opportunity for state review is not provided where various types of claims, because they are raised for the first time on appeal, lack an adequate factual record for decision.[19] *See Cruz-Sanchez v. Rivera Cordero*, 728 F.2d 1531 (1st Cir. 1981) (claim of newly-discovered evidence, raised on direct appeal, not exhaust-

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[19]An intra-circuit conflict has arisen in the Third Circuit on this point. A 1987 panel decision dismissed a petition, on exhaustion grounds, to allow further factual development in state court of an ineffectiveness claim raised on state direct appeal. *O'Halloran v. Ryan*, 835 F.2d 506 (3d Cir. 1987). While the *O'Halloran* holding accords with the congressional mandate of § 2254(c), application of the exhaustion rule used in *Chaussard* and the present case produces contrary results. Such divergent decisions have engendered confusion and fostered dissimilar applications of the exhaustion doctrine at the district court level.

ed); *Walker v. Dalsheim*, 669 F. Supp. 68 (S.D.N.Y. 1987) and *United States ex rel. LaSalle v. Smith*, 632 F. Supp. 602 (E.D.N.Y. 1986) (both applying *Klein v. Harris* to decline federal review of ineffective assistance of counsel claims raised on direct appeal); *Varnell v. Young*, 839 F.2d 1245 (7th Cir. 1988) (sentencing claim, raised on direct appeal, lacked adequate factual record); *Gornick v. Greer*, 819 F.2d 160 (7th Cir. 1987) (ineffectiveness claims, raised on direct review, lacked adequate record).[20]

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[20]While the Third Circuit's extreme position is uniformly rejected, disagreement among the circuits has arisen over the extent to which there should be deference to a state's procedural scheme. The Fifth Circuit requires compliance with procedures which are not unduly "burdensome," finding that "what constitutes a 'fair opportunity' is not necessarily coextensive with whatever procedural requirements the state may choose to impose." *Carter v. Estelle*, 677 F.2d 427 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056 (1983). Thus, federal review was considered appropriate where state review had been declined because of a violation of a state briefing rule which concerned only a technical aspect of the brief's form. *See Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978). The Sixth Circuit conflicts with the Seventh Circuit with respect to violations of appellate waiver rules where a state also has a fundamental error rule. The Sixth Circuit regards the existence of a fundamental error rule as sufficient to provide an opportunity for meaningful state review, even if the state's highest court expressly declined to review a case under such a rule. *See Wiley v. Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981). The Seventh Circuit holds to the contrary reasoning that where review under a state fundamental error rule is limited to exceptional cases involving gross error, the rule would not provide a basis for meaningful review of a claim not of that magnitude. *See Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir. 1985); *cf. Pitchess v. Davis*, 421 U.S. 482, 488 (1975) ("denial of an application for an extraordinary writ by state appellate courts d[oes] not serve to exhaust state remedies where the denial could not fairly be taken as an adjudication of the merits of claims presented"). The Ninth Circuit accommodates a state's procedural scheme to the extent that its procedures admit of no exceptions. Because Oregon has a

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The Third Circuit's illogical rule should be rejected. It is plainly repugnant to the comity principle expressed by this Court over a century ago in *Ex Parte Royall*, 117 U.S. 241 (1886), and consistently adhered to since. The Third Circuit approach relegates the exhaustion requirement to a mere charade and exalts a tokenism previously disclaimed by this Court. *See, e.g., Picard v. Connor*, 404 U.S. 270, 275-276 (1971) ("it is not sufficient merely that the federal habeas applicant has been through the state courts").

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statutorily-prescribed procedure for review of claims arising on appeal, applicable to all cases, compliance with it is required to exhaust state remedies. *See Kellotat v. Cupp*, 719 F.2d 1027 (9th Cir. 1983); *accord McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986) (California Supreme Court rule on petitions for rehearing which prohibits the raising of matters not presented to courts below requires federal court deference); *Lindquist v. Gardner*, 770 F.2d 876 (9th Cir. 1985) (the "clarity" of Idaho's state statutory scheme for post-conviction review requires compliance to satisfy exhaustion requirement).

California's procedure with respect to ineffective assistance of counsel claims, raised via the state's habeas corpus procedure to the appellate courts, is considered "ambiguous" by the Ninth Circuit because it contains a narrow exception. Like New York and Pennsylvania, the California appellate courts generally forego ruling on ineffectiveness claims raised before them for the first time on direct appeal. In rare cases, ineffectiveness claims can and will be resolved on the trial record alone, although a record is usually required to document the basis for counsel's action or inaction. Because of the possibility that the California Supreme Court, in an unusual case, could address the merits of such an ineffectiveness claim, the Ninth Circuit employs the presumption, contrary to state law on the point, that summary denials by the California high court of ineffectiveness claims are on the merits. *See Turner v. Compoy*, 827 F.2d 526 (9th Cir. 1987). Because of the breadth of the Ninth Circuit presumption, and its variance from state practice, the California high court is deprived of an opportunity for meaningful review of the vast majority of ineffectiveness claims raised in this manner. *See Compoy v. Turner*, Petition for Writ of Certiorari, U.S. Supreme Court No. 87-889.

Surely, the reward of federal review ought not to be premised upon the successful violation of a state's procedures, as the Third Circuit rule permits. Such an approach can only encourage disrespect for, and further violations of, the state process.

By its rule, the Third Circuit inevitably encourages forum-shopping as an appellate strategy notwithstanding this Court's express repudiation of the practice. *See Murray v. Carrier,* 477 U.S. 478 (1986). By the simple expedient of raising designated federal claims in a defaulted or otherwise unreviewable form, a state prisoner may deftly deprive the state of its opportunity to correct and review federal claims. Federal review in such circumstances is unaided by state factual and credibility findings or pertinent explication of its laws. Indeed, the federal courts will assume the role of fact-finders, in disregard of the contrary congressional mandate set forth in 28 U.S.C. § 2254(d). *See Sumner v. Mata,* 449 U.S. 539, 549-550 (1981). This Court must not permit fundamental state interests to be defeated by such transparency.

As a practical matter, the Third Circuit approach only increases the caseload of already overburdened federal courts. The winnowing-out of frivolous appeals and issues which inevitably occurs through state litigation would cease. Not only would the federal docket be congested with more cases, but vastly more judicial time and resources would be required to provide the evidentiary hearings and other factual and credibility findings which habeas applicants declined to obtain in the state forum. The operation of federal habeas review according to congressional intent requires that a full opportunity for state

review be given, with due regard for a state's procedural scheme.

In affording meaningful review, a state's choice of the procedures and practices it regards as best facilitating the goal of full and fair presentation of claims must be respected, with their compliance made a requirement for federal habeas review. Moreover, in analyzing the exhaustion issue, federal interpretation of state rules and procedures should faithfully reflect their meaning and application, as employed by the states.

The Third Circuit's equating of jurisdiction with meaningful review plainly intruded upon and misconceived Pennsylvania's judicial system. Similar results have followed from the Sixth Circuit's treatment of state fundamental error rules and the Ninth Circuit approach to flexible procedures, such as California's rule for ineffectiveness claims. In each instance, a fiction of federal law has been created which failed to reflect the state's actual opportunity to review the merits of the claims presented. Where a state has not cut off the availability of review, but rather its opportunity for review has been temporarily precluded by procedural irregularities on the part of the prisoner seeking review, the interests of comity require that review be sought in the state forum.

Each of the three state procedures at issue here serves the goal of complete and fair presentation of claims. Denial of respondent's habeas corpus petition on exhaustion grounds would have been appropriate based on the presence of any one of them. Their confluence only increased the state's—and respondent's—interest in resort to further state remedies, to allow for a complete consideration of respondent's claims. This Court should reverse

the Third Circuit's contrary ill-based decision and deny the petition on exhaustion grounds. In so doing, this Court should insure that federal courts, in determining compliance with § 2254(b), must defer to the procedures and practices which state courts deem necessary for meaningful state court review.

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CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Third Circuit Court of Appeals be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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